

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION**

DORA LAKE,

Appellant,

v.

JOHN HYPOLITE, d/b/a
DO RIGHT CONSTRUCTION,

Appellee.

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)D.C. Civ. App. No. 2001-237

)Re: Terr. Ct. Civ. No. 254/2000

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On Appeal from the Territorial Court of the Virgin Islands

Considered: October 31, 2003

Filed: February 17, 2004

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **MARIA M. CABRET**, Presiding Judge of the Territorial Court, Sitting by Designation.

ATTORNEYS:

Robert A. Eberhart, Esq.

St. Thomas, U.S.V.I.

Attorney for Appellant,

Stephen A. Brusch, Esq.

St. Thomas, U.S.V.I.

Attorney for Appellee.

MEMORANDUM OPINION

Per Curiam.

I. STATEMENT OF THE CASE

Appellant Dora Lake entered into a construction contract with appellee John Hypolite d/b/a Do Right Construction on or about March of 1996. Lake filed a complaint with the Department of Licensing and Consumer Affairs sometime in 1998. On April 15, 1999, the Department of Licensing and Consumer Affairs issued a report stating that appellee had failed to complete the contract between the parties and estimated the cost of completing the work on Lake's property to be \$9,300. Lake filed a complaint for breach of contract in Territorial Court on April 26, 2000, including as an exhibit the report of the Department of Licensing and Consumer Affairs. Appellee filed an answer on May 10, 2000, making no objection to the inclusion of the report. Appellant served appellee with interrogatories and requests for production on June 8, 2000. Appellee failed to respond to the discovery requests. On April 24, 2001, the Territorial Court entered default against appellee for failing to defend the suit and set a hearing to determine damages. At the hearing, the trial judge determined that the parties had entered into a contract for construction on the appellant's home. In an order dated October

15, 2001, the court found that appellant had proved liability but had failed to prove damages. The judge awarded appellant nominal damages.

The appellant filed a timely motion for reconsideration which was denied on October 17, 2001. Lake then filed a timely notice of appeal and moved the court to authorize her leave to proceed *in forma pauperis*. The motion to appeal *in forma pauperis* was denied by the Territorial Court on March 22, 2002.

II. STATEMENT OF THE FACTS

Lake is the owner of property located at No. 7-6 Estate Tabor and Harmony. Her home was significantly damaged by Hurricane Marilyn. She contacted Hypolite to estimate the cost of repairs. Hypolite prepared a contract that described the work he would perform. The contract provided that Lake would purchase all materials for the job and that Hypolite would be paid \$26,865 for labor.

Hypolite began work on Lake's house sometime in 1996. He stopped work on the property sometime in 1997. Lake paid Hypolite \$32,730 before his cessation of construction activity. After Hypolite completed his work, Lake complained about the quality of the repairs. Hypolite allegedly promised to return to complete the job, but he did not do so.

Lake made a formal complaint against Hypolite to the Department of Licensing and Consumer Affairs ["Licensing"]. Licensing initiated an investigation and hired an architect, Brian Turnbull, to evaluate the case. Turnbull obtained estimates from three contractors and conducted an on-site inspection in March, 1999. He determined that repairs were necessary and estimated the cost to be \$9,300.

The appellee did not make the repairs recommended by Licensing. Lake thereupon filed a complaint for breach of contract in Territorial Court on April 26, 2000. She included with her complaint the repair cost estimates and Turnbull's report. Hypolite filed an answer on May 10, 2000. He did not admit or deny the information contained in Turnbull's report.

Lake initiated discovery against Hypolite on June 8, 2000. Hypolite did not respond to interrogatories or requests for production, violating the court's scheduling order and order compelling production of documents. On April 24, 2001, the court entered default against Hypolite and set a hearing "to determine damages."

On October 4, 2002, Lake filed a motion entitled "Itemization of Damages," referring the court to the estimates included in her initial complaint. The following day, the judge held a hearing. Contrary to the court's order of April 24, 2000

entering default against Hypolite and setting a hearing "to determine damages," the trial judge insisted that Lake put on a case to determine liability.¹

The hearing proceeded and Lake attempted to prove both liability and damages. Lake's counsel attempted to elicit testimony from Lake regarding contractor's estimates to prove damages. The trial court sustained Hypolite's objection to such testimony as hearsay.

Lake's counsel requested a continuance in order to subpoena the contractors who had prepared estimates of the cost of repairs. The court denied the continuance. Lake's attorney attempted to introduce the evidence of the estimates prepared by the contractors and the Turnbull report.

¹ The following exchange occurred at the hearing on October 22, 2002:

THE COURT: Has there ever been a default judgment for liability If not you have no liability.

ATTORNEY EBERHART: Your Honor, your order specifically states [the defendant] has been found in default in this matter.

THE COURT: An entry of default is not a default judgment as to liability.

ATTORNEY EBERHART: Your Honor, if I can turn your attention to your order of April 24th, the second paragraph:

"Accordingly, it is hereby ordered, that defendant is deemed to have failed to defend the above-captioned action and default is hereby entered against him; and it is further ordered that plaintiff shall appear . . . for a hearing to determine damages."

THE COURT: Entry of default does not prove liability.

At the conclusion of the hearing, the judge determined that Lake had proved that Hypolite was liable for failure to complete work on the property, but that Lake had not proved her damages. The court awarded Lake nominal damages of one dollar.

Lake timely filed a motion for reconsideration with an accompanying affidavit of Turnbull regarding the issue of damages. The court denied this motion. Lake then filed a timely notice of appeal and a application to proceed *in forma pauperis*. She alleged in her motion that she was single, retired, and had limited resources and significant expenses, including the cost of treatment for colon cancer. Despite this information, the court denied Lake's request, stating that she could rent out the spare bedroom in her home for additional income. Lake's affidavit noted that the bedroom was rented out and the income already accounted for.

III. DISCUSSION

The first issue before the Court is whether the Territorial Court abused its discretion in failing to consider the evidence presented on damages. We must also consider whether the Territorial Court erroneously denied appellant's motion to proceed on appeal *in forma pauperis*.

A trial court's ruling regarding the admission or exclusion

of evidence is reviewed for abuse of discretion. *United States v. Stewart*, 806 F.2d 64, 68 (3d Cir. 1986). We review the denial of the motion to proceed *in forma pauperis* under the same standard.

This is a civil action arising out of a contract involving construction. Jurisdiction in the Territorial Court of the Virgin Islands arises pursuant to V.I. CODE ANN. tit. 4, § 76. Before us is an appeal from final orders entered by the Territorial Court on October 15, 2001 (awarding nominal damages) and March 22, 2002 (denying motion to appeal *in forma pauperis*). We have jurisdiction pursuant to 4 V.I.C. § 33.

The trial court, in a written order, entered default against Hypolite and set a hearing to determine damages. At the hearing, the court seemed to disregard its order and insisted that Lake present a case to prove liability and refused to consider Lake's evidence regarding damages. Lake argues that this was an abuse of discretion.

It is true that the trial judge instructed Lake to put on a case to prove liability after entering an order of default against Hypolite. Lake's counsel was justified in being taken by surprise. A fair reading of the hearing transcript, however, reveals that Lake was not prepared to prove damages. The confusion regarding the issue of proof of liability

notwithstanding, trial counsel had no witnesses at trial to prove damages other than Lake.² Lake's testimony could not be sufficient to establish damages, as her testimony about the repair estimates she received would be inadmissible hearsay.

Lake's counsel, having failed to bring the necessary witnesses to the hearing, then asked for a continuance to arrange for witnesses to testify. The court denied the request for a continuance, on the basis that Lake had filed a motion of readiness.³ The court did not abuse its discretion.

² ATTORNEY EBERHART: I would like to call Ms. Dora Lake to the stand.
THE COURT: Any other witnesses?
ATTORNEY EBERHART: No, Your Honor.

App. 44.

³ ATTORNEY EBERHART: I would request we have a continuance of one week so that I can prepare my witness and bring Ms. Lake's daughter and also bring a contractor to the court to -
THE COURT: That's what you were supposed to do today. ... Why isn't a contractor here for damages? Why isn't a contractor here?

App. 95

The colloquy continued:

THE COURT: So let me skip over and assume that you've proved liability - what am I supposed to do now?
ATTORNEY EBERHART: Your Honor, I worked with Ms. Lake to get a contractor here. She was unable to do that today. I would request that we subpoena one of the contractors that made the estimate.
THE COURT: Who is we?
ATTORNEY EBERHART: That I subpoena one of the contractors paid to perform the estimates so we can present that testimony before the Court.
THE COURT: I didn't make a motion of readiness. And if you didn't subpoena him for today why should I continue it? . . .
ATTORNEY EBERHART: Your Honor, Ms. Lake said she would like to attempt to contact him now . . . to come to the courthouse today

Lake further argues that the court should have considered the Turnbull report as evidence because it was attached to the complaint and Hypolite did not object. This argument is without merit. A report attached to the complaint is not proper evidence admissible at trial, even if the defendant did not object to it. The fact that Hypolite did not properly participate in the discovery process does not mean that anything the plaintiff attached to the complaint becomes admissible evidence of damages.

Lake also argues on appeal that the Turnbull report was admissible evidence under Rule 803(8) of the Federal Rules of Evidence. We need not consider whether the report would have been admissible under this Rule, because Lake's counsel failed to raise this evidentiary argument at the hearing. Lake furthermore failed to raise this argument in her motion for reconsideration. (App. 110.)

Nor is Lake's argument meritorious that the trial court should have considered her "Itemization of Damages" as evidence. This list was inadmissible without a witness to support and

to testify.

THE COURT: What you mean today? When today?

ATTORNEY EBERHART: We request that we have the opportunity to make an attempt to contact him.

THE COURT: But you have already rested. Anything else?

ATTORNEY EBERHART: No. No, Your Honor.

explain the basis for the amounts listed.

We turn now to appellant's petition to proceed *in forma pauperis*. Despite the evidence showing that Lake has a gross income of less than \$1,000 per month and has a monthly deficit of approximately \$500, the court denied her motion to proceed *in forma pauperis*. The court suggested that Lake could supplement her income by renting her spare apartment, despite the fact that Lake was already renting the apartment and the majority of her income was already from this rental. Lake argues that the court's disregard of these facts in its denial of Lake's motion constitutes an abuse of discretion.

We need not rule on Lake's argument, however, because we find that the Territorial Court had no jurisdiction to decide Lake's motion to proceed *in forma pauperis*. Only the Appellate Division may decide such a motion. See V.I. R. APP. P. 3(b) ("Petitions to proceed *in forma pauperis* . . . will be determined by the Appellate Division.") Having considered Lake's motion to appeal *in forma paueris*, we will grant it *nunc pro tunc*, and the court will refund her the costs associated with this appeal.

VI. CONCLUSION

The Territorial Court did not err nor did it abuse its discretion in refusing to consider evidence of damages. The

decision below awarding nominal damages will therefore be upheld. The Territorial Court did err in ruling on Lake's motion to proceed with her appeal *in forma pauperis*. The trial court's ruling on of Lake's request to proceed *in forma pauperis* will be vacated. We grant Lake's request *nunc pro tunc*, and the court will refund her the costs associated with this appeal.

DATED this 17th day of February, 2004.

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

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St. Thomas, U.S.V.I.

Attorney for Appellant,

Stephen A. Brusch, Esq.
St. Thomas, U.S.V.I.

Attorney for Appellee.

ORDER OF THE COURT

Per Curiam.

AND NOW, this 17th day of February, 2004, having considered the parties' submissions and arguments, and for the reasons set forth in the Court's accompanying Memorandum Opinion of even date, it is hereby

ORDERED that the Territorial Court's decision awarding nominal damages is **AFFIRMED**; it is further

ORDERED that the Territorial Court's decision denying appellant's motion to appeal *in forma pauperis* is **VACATED**; it is further

ORDERED that the appellant's motion to appeal *in forma pauperis* is **GRANTED nunc pro tunc**; it is further

ORDERED that the court shall refund appellant the costs associated with this appeal.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Judges of the Appellate Panel
Honorable Geoffrey W. Barnard
Honorable Jeffrey L. Resnick
Judges of the Territorial
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